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No. 04-469

IN THE
Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC. and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR RESPONDENT YOUNG ISRAEL OF BAL HARBOUR

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The first two Questions Presented by the Petition for a Writ of Certiorari in this case raise constitutional challenges under the Tenth Amendment and under the Establishment Clause of the First Amendment to Section 2 (the Land Use provision) of the Religious Land Use and Institutionalized Persons Act of 2002 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. No federal court of appeals has sustained a constitutional attack on the Land Use provisions of this law. And the Court of Appeals for the Eleventh

Circuit unanimously found Section 2 to be constitutional in the present case. The entire complement of active judges of the Eleventh Circuit concurred in this conclusion. Pet. App. J, p. 163a ("no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc . . . ."). In addition, the Eleventh Circuit explicitly sustained the constitutionality of Section 3 of RLUIPA in *Benning v. Georgia*, __ F. 3d __, 2004 WL 2749172 (11th Cir. Nos. 04-10979, 04-11044, December 2, 2004).

On October 12, 2004, the Court granted a Writ of Certiorari, however, to review Section 3 of RLUIPA – *i.e.*, the provisions relating to prisoners ("institutionalized persons") incarcerated for the commission of criminal offenses. *Cutter v. Wilkinson,* No. 03-9877. Although the petition for a writ of certiorari in that case refers only to the Establishment Clause of the First Amendment, the Brief for the United States in *Cutter* suggests that if certiorari is granted in that case "the respondent state officials would be free to raise a host of distinct constitutional challenges to RLUIPA as alternative grounds for affirmance." Brief for the United States, No. 03-9877, p. 9. The State of Ohio's Brief in Response in the *Cutter* case also urges the Court to "resolve all of the questions regarding RLUIPA's constitutionality in one round of review." Brief in Response, No. 03-9877, p. 14. These include a challenge to RLUIPA's validity under "the Spending and Commerce Clauses and Tenth and Eleventh Amendments." *Id.*, p. 16.

Section 2 of RLUIPA presents similar constitutional questions under the Establishment Clause to those raised in *Cutter v. Wilkinson,* No. 03-9877. The legislative history of Section 2, however, differs from that of Section 3. Section 2 was based on a record of widespread state and local discrimination against religious institutions by means of zoning regulations. 146 Cong. Rec. S7775 (daily ed. July 27,

2000) (joint statement of Sens. Hatch and Kennedy); see also H.R. Rep. No. 219, 106th Cong., 2d Sess. 18 (1999); *id.* at 24 (concluding that result of various forms of zoning discrimination "is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship"). And the constitutional challenges apart from petitioner's First Amendment claim also implicate different constitutional considerations when applied to Section 2 then when applied to Section 3.

The constitutional flaws that the Sixth Circuit found in Section 3 of RLUIPA are not present in Section 2. Granting to religious institutions land-use rights that are equal to those enjoyed by non-religious similarly situated groups does not have the effect of encouraging religion, which the Sixth Circuit in *Cutter* viewed as an impermissible consequence of Section 3. And interference with a local government's administration of its zoning laws differs in kind from interference with administration of its prisons.

The Court should not, we submit, issue a decision that affects the constitutionality of Section 3 of RLUIPA without considering the effect of such a decision on Section 2 of the same law. And if the Court considers constitutional challenges to RLUIPA apart from the Establishment Clause attack sustained by the Sixth Circuit in *Cutter*, its decision will have an effect on the constitutionality of Section 2.

The Court may, of course, hold this case on its docket until it decides *Cutter v. Wilkinson*, No. 03-9877. On the other hand, the Court may choose to grant certiorari in this case and set it for argument to follow *Cutter v. Wilkinson*, No. 03-9877. In order to enable the Court to arrive at a decision in this Term of Court, the respondent will expedite its briefing of this case.

Respectfully submitted,

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